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ON THE MOVE

The U.S. Supreme Court should order rehearing of abortion case

By Timothy D. Reuben

As we all know, a draft opinion of the US Supreme Court about abortion was leaked and it purported to reverse the 50-year-old precedent of *Roe v. Wade*. Justice John Roberts has stated publicly that the leak was “absolutely appalling.” Justice Clarence Thomas has stated that this leak irreparably damaged the Court and is an unthinkable breach of trust. The reaction around the country has been massive, particularly because it is reported that as much as 75% or more of America favors abortion rights. Public rallies and demonstrations have occurred around the country and there has been picketing in front of some of the Justices’ homes. Different state governments, depending on their political thinking, have initiated legislation – with some states seeking to make the right to abortion a state constitutional right while other states threaten to ban any abortion and criminalize any woman who has one or any doctor who performs one. Countless articles have criticized the Court for the draft opinion, including its references to irrelevant history, and even Saturday Night Live has substantively mocked the reasoning and politics of the leaked opinion.

Rooted in the penumbra of the Constitution, the Constitutional right of privacy has formed the basis of many individual rights, including the right of a woman to choose what she should do with her own body. Ironically, the so-called “conservative” majority of the Court appears to have taken on a decidedly activist role in apparently intending to overrule established precedent that has been reviewed and reaffirmed by many past capable justices. This judicial activism panders to the political and religious views of anti-abortionists as opposed to sound legal principles.

Justice Thomas has stated that the Court will not be “bullied” by public opinion or the justifiable outcry against the Court, and he is correct that the Court should not be pushed around by popular views; however, the overwhelming response of American citizens against the draft opinion should not be ignored by the Court, but rather noted and considered. The Court needs to be aware that if it takes away individual rights, that does not occur in a vacuum.

At this point, the Court is in a quandary which could have long term effects on the institution itself, causing it to lose credibility. Trust in our judicial system by the public is essential for a free society based on law, so the Court needs to proceed carefully.

What the Court should do is NOT issue this opinion, but go back to the drawing board. On the one hand it cannot be seen as being swayed by public demonstrations in interpreting the law, and in fact we do not want any of our bench officers to be intimidated. On the other hand, the Court must take notice of the impact of its rulings and wake up to the historical importance of its status in today’s America. This is not *Marbury v. Madison* that most in America did not know about at the time, but the Court is being carefully scrutinized and reforms of the Court are being discussed, including increasing the number of Justices and instituting term limits.

For now, the best way forward is to order a rehearing with briefs from Amici Curiae, and then have the matter fully reargued in the next term. Starting from scratch will allow the Justices who appear to have ruled to overturn *Roe* to reconsider their view without the appearance of being bullied. A new draft opinion should be written. Ultimately, to maintain credibility, the Justices should recognize the importance of precedent on which our law is built. And any opinion should not rest on discussions of the views from one hundred or two hundred or three hundred years ago – they didn’t have cell phones then or have modern medicine or fly around

the world or be able to Google an answer at will. If given the opportunity, perhaps the Court will recognize the importance of its role in America and do the right thing.

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